CITY OF DALLAS

APR 15 1996

April 12, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, DA 91-577, 45-DSS-MSC-93

Dear Sir or Madam:

Enclosed herewith please find an original and eleven copies of the Local Communities' Comments in response to the Notice of Further Proposed Rulemaking in the above referenced matter. Please file stamp one copy and return to the undersigned in the enclosed envelope. Should you have any questions, I may be contacted at (214) 670-3478.

Sincerely,

Scott Carlson
Assistant City Attorney
City of Dallas

On behalf of the Local Communities

Enclosure

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Comments submitted

by

the Cities of Dallas, Texas; Arlington, Texas; Austin, Texas; Fort Worth, Texas; Knoxville, Tennessee; the National Association of Counties; and the United States Conference of Mayors

in response to

The Report and Order and Further Notice of Proposed Rulemaking

in the Matter of the

Preemption of Local Zoning Regulation of Satellite Earth Stations

Summary

The Local Communities, composed of organizations representing local governments nationally and local governments in Texas and Tennessee, request that the adopted rule, at a minimum, be revised to reflect Congressional intent.

The Local Communities assert that the rule as developed is more expansive than intended by Congress. Services are covered which are explicitly excluded from the rulemaking authority. The Local Communities believe that Congress, in the most sweeping pronouncement on telecommunications in nearly half a century, indicated those services which it considered appropriate for Commission rulemaking. Many potential reasons exist for the apparent restraint shown by Congress. But one thing is certain, Congress intended a much more limited rulemaking scope and constrained rule than the Commission. The Local Communities contend that the Commission should defer to the clear expression of Congressional will and intent.

The Local Communities contend that the adopted rule does not reflect the standard which Congress directed. Congress indicated a standard of impairment. The rule adopted by the Commission only presumes a standard of impairment. There is no actual finding of impairment by a particular local government regulation.

The Local Communities contend that the adopted rule exceeds recently expressed limitations on federal regulatory authority. The Supreme Court

recently curtailed the exercise of Commerce Clause power in areas reserved for the exercise of traditional local police power. The Court noted that the regulated activity must "substantially affect" interstate commerce. While the record is replete with alleged instances and allegations of abuse, in reality, compared to the existing number of subscribers and the exponential growth and forecasts for the industry, the regulated activity, local zoning and other codes, do not substantially affect interstate commerce. The Commission has substituted its judgment for that of the state and local government officials in health and safety matters, traditional areas of local police power and judicial deference, and precluded enforcement of such regulations absent Commission approval. The Local Communities can enforce setback and variance requirements related to a ten foot pole with a basketball hoop atop it but if the same pole has a satellite dish a local government must first rewrite its codes making them specifically applicable to satellite dishes and then seek Commission approval. Surely Congress did not intend such a result.

A per se presumption of invalidity of local ordinances turns the traditional judicial deference which state and local government health and safety regulations enjoy on its head. It is contrary to federalism principles.

Finally, with regard to the new provision on nongovernmental restrictions, the Local Communities believe that the Commission is taking dangerous Constitutional steps.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

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	)	

COMMENTS OF THE CITIES OF DALLAS, TEXAS; ARLINGTON, TEXAS; AUSTIN, TEXAS; FORT WORTH, TEXAS; KNOXVILLE, TENNESSEE; THE NATIONAL ASSOCIATION OF COUNTIES; AND THE UNITED STATES CONFERENCE OF MAYORS

The cities of Dallas, Texas; Arlington, Texas; Austin, Texas; Fort Worth, Texas; Knoxville, Tennessee; the National Association of Counties[1]; and the United States Conference of Mayors[2]; (hereafter collectively referred to as "the Local Communities") file these comments in the above-captioned proceeding.

Introduction

In its Report and Order and Further Notice of Proposed Rulemaking In the Matter of Preemption of Local Zoning Regulation of Satellite Earth

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1 The National Association of Counties speaks for the approximately 3100 counties across the nation.

2 The United States Conference of Mayors represents mayor of the more than 1050 cities with a population of 30,000 or more.

Stations, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (released March 11, 1996) ("NPRM"), the Federal Communications Commission ("the Commission") adopted a rule which preempts local zoning regulation over satellite earth stations.[3] The Commission has requested further comments on its adopted rule in light of the passage of the Telecommunications Act of 1996.[4] The Commission adopted the rule based on its mandate to further the goals of the 1934 Communications Act.[5] In addition, the Commission has requested comments on a new rule directed toward nongovernmental restrictions on small antenna video reception.[6]

The differing roles and perspectives of local government officials and the satellite industry have lead to the characterization of local governments as a barrier to entry and competition. On the part of local governments, it is simply a desire to protect and preserve the assets of the public and to be responsive to the electorate. Local government officials are the ones directly responsible to the citizens and assume and discharge their elected duties with those obligations in mind. Implementation and enforcement of local zoning,

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[3] 47 C.F.R. § 25.104.

[4] The Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996) ("the Act").

[5] 47 U.S.C. 151, NPRM ¶ 12. "The federal interests at stake here are very significant. They stem from the Communications Act which directs us to assure "to all the people of the United States a rapid, efficient, Nation-wide and world wide wire and radio communication service with adequate facilities at reasonable charges."

[6] ¶ NPRM 55-63.

building and safety codes reflect this duty to the local electorate. Satellite service providers, on the other hand, have no obligation to the electorate with regard to health, safety and land use. Rather, industry desires to deliver the most services it can in the most inexpensive manner possible. The Commission adds a third dimension and perspective with its obligation to pursue the mandate of the Communications Act of 1934 and the Act.[7] While it is recognized that these competing interests are being reviewed by the Commission during the rulemaking process, the Local Communities urge the Commission to recognize and affirm principles of federalism and the functions of local government. It is unfortunate that this may involve minimal impositions on satellite antenna dish services, but that seems a small price in preserving a system of federalism.

The Commission asks four questions[8]: 1) Does our newly adopted presumption for antennas smaller than one meter preempt nonfederal governmental restrictions as fully as Congress intended, 2) Does our presumption for all antennas smaller than one meter faithfully reflect Congress's focus on "direct broadcast satellite services" (i.e. does the legislation mandate that our regulations apply to certain types of services rather than to certain size earth station antennas)? 3) Does Congress's focus

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[7] 47 U.S.C. § 151. In re Preemption of Local Zoning or Other Regulation of Receive Only Satellite Earth Station, 51 Fed. Reg. 5519 (Feb.14, 1986), NPRM ¶ 11,12.

[8] NPRM ¶ 58.

on DBS antennas suggest that we should not preempt local regulation of other services, such as VSAT and C-band services? And 4) How should we implement Congress's intent to prevent enforcement of private restrictions such as deed covenants and homeowners' associations? The questions will be addressed in the order presented.

Does Our Newly Adopted Presumption For Antennas Smaller Than One Meter Preempt Nonfederal Governmental Restrictions As Fully As Congress Intended?

A. Is This the Real Question?

The Local Communities contend that the newly adopted presumption expands any preemption which might have been contemplated by Congress beyond Congressional intent. The Local Communities believe that the better question is: "Does the newly adopted presumption rule fully and faithfully reflect Congressional intentions expressed in Section 207 of the Act with respect to DBS satellite services?" The Local Communities contend that the Commission's retrospective rebuttable presumption to local regulations, including regulations of general applicability, extends far beyond any Congressional regulatory intentions. Yes, the Commission had in place a preemption rule but that rule allowed local governments to enforce their public health, safety and welfare regulations. Deference to local regulatory authority was demonstrated.[9] Now, when the City of Dallas Citizens

[9] Preemption of Local Zoning Regulation of Satellite Earth Station, 10 F.C.C. Rcd. 6982 (1995) ("Notice"), ¶ 4, citing the deference in enacting a limited preemption of local zoning restriction

Planning Commission meets, unseen but yet real, is the special seat reserved by the Commission for consideration of decisions involving satellite dishes. The Commission will ultimately decide if a Dallas City Code provision, assuming one is enacted for satellite dishes in the sizes indicated in Subsection (b)(2), is truly enforceable and until the City of Dallas enacts an ordinance and the Commission approves it, the City of Dallas may not enforce any City Code provision which, in essence, touches smaller dishes. We note that, while tacitly the Commission has determined that statutes of general applicability are acceptable, in actuality, these regulations, without amendment, can not rebut the presumption present in subsection (b)(2).[10] The Local Communities can not reconcile such a result with Congressional intent expressed in Section 207 of the Act.

Congress quite specifically imposed a standard of impairment to the rulemaking.[11] It did not, as has the Commission, presume that all local ordinances, including setback and building requirements of general applicability, variances and potential waivers procedures, impaired reception of such signals. While it is true that the Commission's adopted rule is virtually guaranteed to catch all ordinances which impair reception, it goes much farther. The rule presumes <u>all</u> local regulations of <u>all</u> local

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10 In the NPRM ¶ 26 the Commission notes that "...a setback from a public road would appear to be a reasonable health and safety regulation under our rule..." Yet, the Commission has dictated that in order to rebut the presumption for smaller dishes an ordinance specific to satellite dishes be in place.

11 Section 207 of the Act.

governments which touch upon the smaller satellite dishes impair reception. Showing greater deference to the authority of local governments and a recognition of federalism principles, Congress did not apply the "presumption of preemption" approach in its regulatory directions for the smaller satellite dishes. The Commission should not either.

Congress had a great deal of time to express its approval of the Commission approach. This rulemaking was begun prior to Committee action on the House telecommunications bill.[12] The bill was substantially rewritten between Committee action and House floor consideration. Section 207 was amended in conference to include an additional service. If Congress was in agreement with the Commission's approach, it certainly could have adopted a similar approach legislatively or directed the Commission to continue the path which it had begun in this rulemaking. It did neither. It only directed the Commission to develop rules targeted at State and local regulations which impaired reception. Certainly, this was not a blanket direction to preempt all local regulations nationwide which touch upon smaller satellite dishes.

It might be argued that Congress by not precluding the Commission approach has tacitly approved of Commission action.[13] As noted, the

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12 There is no analog to Section 308 of H.R. 1555 in S. 652 as adopted by the Senate.

13 See NPRM ¶ 61. The Commission makes such an argument with respect to VSAT and C-band services. See also ¶¶ 16 and 61.

Commission had a preemption rule already in place.[14] Obviously Congress had notice of the former rule and the proposed rule. Yet, that preemption rule was not adopted by the Congress in Section 207. One possible explanation is that Congress knew of the former and proposed rules and because neither reflected its intention, directed that the Commission begin new rulemaking for specific enumerated services. Even assuming *arguendo* Congress approved of the prior preemption rule and approach, it does not follow that Congress approves of the presumption approach in the adopted rule. Contrasted with the prior rule, the Commission has 1) required that all local codes be rewritten to specifically address satellite dishes and 2) precluded enforcement of local controls until it has determined what is appropriate for local health, safety and welfare.

At no point under the adopted rule must the allegedly aggrieved satellite service user demonstrate that meeting local government requirements, including the usual setback, density, safety and variance requirements, impairs reception. Instead, the rule presumes impairment. A more path more faithful to Congressional intention suggests that, at least, actual demonstrated evidence of impairment be required. This accords deference to local authority and meets the standard set forth in the Act.

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[14] Former 47 C.F.R. § 25.104.

Some guidance may be taken from the House Committee Report ("the Report).[15] Quoting from the Report:

> "The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to zoning laws, ordinances, restrictive covenants or homeowners association rules, shall be unenforceable to the extent contrary to this section."[16] [Emphasis added]

Congress indicated its intention to preempt only those statutes and regulations "...that prevent the use of antennae designed for off-the-air reception ...". Only after such a finding is preemption authorized. The adopted Commission rules go far beyond this. The Commission presumption will operate on local rules and regulations which do not prevent delivery of the enumerated services. They will operate on local rules and regulations where no impairment, let alone prevention, has been demonstrated. Congress does not express a presumption that all local regulations which touch or affect satellite dishes, even small satellite dishes, prevent reception. Nor does the Congressional intent call for specialized treatment of satellite antennas in the enforcement of local zoning or building codes and regulations. Congressional intent falls far short of a nationwide

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[15] NPRM ¶ 56.

[16] House Committee Report, H. Rep. 104-204 at 124.

blanket presumption of preemption of all local rules and regulations which may touch or affect satellite dishes.

B. Does the Problem Justify the Presumption Approach?

The industry cites over 1000 complaints regarding local government regulations.[17] and notes that the abuses cited in the record are just the "tip of the iceberg."[18] The Commission has determined that the evidence compiled in the Notice and NPRM is sufficient to demonstrate a national problem.[19] Yet, as noted in the same paragraph by the Commission, evidence of harmful local regulations relate to only a few jurisdictions.[20] The Commission states that local governments have failed to demonstrate how their regulations do not impair reception. With this data, the Commission finds that a national problem exists.[21] Based on this finding the Commission adopts the rule at issue which is unprecedented in its scope and effect.

The Local Communities note that the direct broadcast satellite business has grown exponentially over the last several years. Forecasts of 5.6 million subscribers between 1994 and 2000 were made by Wall Street analysts.[22] At

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17 NPRM ¶ 21 and accompanying footnote.

18 NPRM ¶ 19.

19 NPRM ¶ 23.

20 Id.

21 Id.

22 Broadcasting and Cable, June 6, 1994 at 55.

least one direct broadcast satellite programmer enlisted over one million subscribers in slightly more than a year.[23] Other providers exceeded forecasts for sales in 1994.[24] One recent newspaper story stated that there are currently 2.6 million satellite dish subscribers.[25] Comparing the 1000 instances of alleged local regulation abuse cited by industry to the some 2.6 million subscribers, approximately to .05% of installations are affected.

In light of the federalism principles, the Local Communities question whether the national interest at stake, as demonstrated by these statistics, demands the sweeping, dramatic rule adopted by the Commission. Industry has failed to demonstrate, through actual complaints or alleged instances of overreaching, a pervasive national problem requiring the presumption of preemption adopted by the Commission. We submit that complaints cited do not demonstrate a national problem requiring such dramatic federal action. In the absence of such demonstrated evidence, the Commission should adopt a rule which is more narrowly tailored and addresses only the services directed by Congress. Yet, despite the acknowledged limited number of local

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[23] Broadcasting and Cable, November 6, 1995 at 106.

[24] HFN, the Weekly Journal for the Home Furnishing Network, November 16, 1995, at 216. The article notes that nearly 600,000 units were sold. Estimates were nearly 400,000. Projections for 1995 were raised from 1.2 million to 1.5 million.

[25] Doug Abrahms, *Mayors dish out objections to satellite-TV zoning ban,* The Washington Times, April 3, 1996 at B8. It is interesting to note that industry representatives assert that mayors are making more of an issue about the adopted rule than it merits and at the same time another industry representative states that local regulations do not currently present a problem.

regulations cited as abusive, the limited record of abuses before it and the bald generalizations by industry, the Commission intends to take the unprecedented step of uniformly preempting zoning, building and other code provisions across the country, precluding enforcement and requiring universal rewrites of codes. It is difficult to argue on the one hand that there is a national problem with recalcitrant and obstructionist local governments and on the other hand enjoy unprecedented growth. Industry representatives acknowledge as much.[26]

One might argue that the Commission did not preempt but instead allowed local governments a mechanism through waivers and rebuttable presumptions to continue application of their regulations.[27] Yet, the Commissions' own comments cast doubt on such a belief.[28] Subsection (b),

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[26] Id.

[27] NPRM ¶ 26. "Thus, we believe we are not stripping local governments of their power to protect health and safety of their citizens by adopting a presumption of unreasonableness" in justifying the rebuttable presumption approach. In that paragraph, the Commission notes that setback and variance requirements applied to other uses would likely meet the standard which it has set for satellite dishes. Yet, the Commission has declined to adopt such an approach which would say that local regulations which are general in nature may be applied to smaller satellite dishes. Instead the Commission intends the creation of a whole set of new regulations which address satellite dishes.

[28] See the Separate Statement of Commissioner Andrew C. Barrett accompanying the Notice. "While Section 303 of the Communications Act may arguably give the Commission latitude in promulgating rules and regulations as the public convenience, interest or necessity requires, I would oppose, as I have in the past, any Commission action that continuously modifies its final rules through the waiver process. While there may be some legitimate health and safety concerns for a particular local jurisdiction, I will likely question the validity of these concerns when considering a satellite dish that is eighteen (18) inches in diameter or smaller." See also various statements in the NPRM, e.g. ¶ 16 where the Commission states its mandate in terms of preemption.

establishes a presumption of invalidity of regulations, which until rebutted to the satisfaction of the Commission, are unenforceable. Both amount to preemption subject to the will of the Commission and the creation of a national zoning board. In addition, the Notice and NPRM are couched in terms of preemption, not an approach of waivers. Further, with all due respect for the Commission, in light of its mandate to further national communications interests[29], the Local Communities question the hearing which local zoning, building and other codes will receive.

C. Alternatives; Is this Really the Correct Approach?

The Local Communities request that the rules promulgated in the NPRM be revised and limited to correctly reflect Congressional intent. We suggest that the Commission adopt a rule which presents an impairment of reception before preemption is warranted. In such a case, the Commission will actually be dealing with a real and not just a presumed problem. Such an approach will also reflect a greater deference for local zoning and other regulations. Expedited Commission review of such complaints could be established. The review could be through paper filings and not personal appearances.[30] Such an approach should not be overly burdensome on the Commission based on the evidence of abuses submitted thus far. The paper filing process will allow

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29 See ¶ 3 of the Notice, citing Section 1 and other provisions of the Communications Act, 47 U.S.C. § 51. See also, NPRM ¶ 12.

30 NPRM ¶ 47.

either a satellite company or an individual allegedly aggrieved by a local regulation to inexpensively pursue the allegation, especially if standard complaint forms were developed. With such a process in place, the Commission would review whether an actual impairment of reception has taken place. In the alternative, the Local Communities request that the Commission implement a rule which mimics the legislation and then enforce the rule on a case-by-case basis. As a third alternative, the Commission could adopt a narrowly tailored remedy which applies only to smaller dishes in accordance with Congressional intent and thereby limit the effect of its regulatory actions. [31]

At a minimum, the rule should exempt local government regulations that are of general application and cover only regulations specifically directed at satellite dish antennae. If a property owner places a one meter satellite dish in his or her sidewalk, in a position which might catch the afternoon sun, or places multiple dishes in a front or rear yard, or installs the dishes in a shoddy manner so that the first gust of wind will cause it to become a flying saucer,

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[31] In accordance with expressed Congressional intentions, the rule should be limited to higher power direct broadcast satellite services and should not include VSAT and C-band satellite services. An actual impairment must be demonstrated.

We note that the satellite industry states that compliance with local regulations will make competition with cable more difficult. See NPRM ¶ 21. The Commission should note that Congress has required cable operators to submit to, arguably, more extensive local regulatory authority than the satellite industry, e.g. cable franchise fees, peg requirements and consumer protection standards are among some of the typical requirements. We are not contending for similar authority here with respect to satellite services, but simply noting that the cable industry must accommodate local interests and a similar accommodation of local interests with respect to satellite services is justified.

under the adopted rule, the Local Communities now must develop special regulations to address such issues and come to the Commission in order to enforce its regulations or seek a waiver. Surely, Congress did not have such an extensive intrusion in mind when it enacted Section 207 of the Act.

The standard of review in the adopted rule is reversed from the traditional deference shown local health, safety and welfare regulations in the federal courts. [32] While these regulations may be applied under the adopted rule if the presumption is rebutted to the Commission's satisfaction, the Local Communities suggest that the adopted rule should mirror the deference accorded local safety, health and welfare regulations in the federal courts.

Does Our Presumption For All Antennas Smaller Than One Meter Faithfully Reflect Congress's Focus On "Direct Broadcast Satellite Services" (i.e. Does The Legislation Mandate That Our Regulations Apply To Certain Types Of Services Rather Than To Certain Size Earth Station Antennas)?

The Local Communities believe that Congress intended the Commission to focus on services rather than size. The language in the statute and the Report are confined to services. We submit that the adopted

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[32] The Commission notes in ¶32 that reversal of the standard of persuasion is not determinative. Yet, it is instructive that the federal courts apply exactly the opposite standard to health and safety regulations enacted by local governments. E.g. Pennington v. Vistron Corp., 876 F.2nd 414 (5th Cir. 1989), "Presumption against preemption applies to state or local regulation on matters of health and safety" at 417, *see also* Hillsborough County v. Automated Medical Laboratories, 471 U.S.707, 715, 105 S. Ct. 2371, 2376, 85 L.Ed.2d 714 (1985). Interstate Towing Ass'n, Inc. v. City of Cincinnati, 6 F.3d. 1154 (6th Cir. 1993) where the court in considering towing regulations which were enacted for safety, minimum levels of service and consumer protection reasons states, "Such concerns have consistently been regarded as legitimate, innately local in nature and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce." at 1163. *See also* Pike v.Bruce Church, Inc. 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

rule does not reflect the Congressional regulatory instructions but instead reaches services not contemplated by Congress. The Local Communities submit that the Commission has no Congressional authority for a rulemaking more expansive that intended by Congress in Section 207. At no place in the record, is found mention of other services besides the ones listed in Section 207, as further explained in the Report.

The Report specifically notes that the regulations which the Commission is directed to promulgate target only the higher powered DBS services. It used the words "Direct Broadcast Satellite Services" purposefully. By inference, Congress chose not to include the services with lower power such as Fixed Satellite Service ("FSS") providers.[33] Accordingly, the Commission rule should be revised to limit its application to the higher power DBS services and eliminate application to FSS.

The Commission notes in the NPRM that the diameter of the higher power direct broadcast satellite antennae do not reach one meter but at most are approximately 18 inches.[34] In such a traditional area of local control as zoning or building and safety codes, the Commission's adopted rule exceeds the Congressional directive for regulation and should be trimmed to reflect this traditional local prerogative and Congressional instruction. If the

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[33] NPRM ¶ 60. Contrary to Commission assertions, there is no evidence in the record to support a Congressional intent to address local controls on FSS.

[34] NPRM ¶ 6.

Commission continues to pursue a rebuttable presumption based on size (which is not the approach preferred by the Local Communities), it should limit the effect to antennas which are 18 inches, or approximately 1/2 meter, not one meter. Besides being in accord with Congressional intention, this will also encourage the industry to make its dishes as inconspicuous as possible.

Does Congress's Focus On DBS Antennas Suggest That We Should Not Preempt Local Regulation Of Other Services, Such As VSAT And C-Band Services?

The answer to this question is an unequivocal yes. Congress was explicit in its instructions concerning those services to be impacted under Section 207 of the Act. It chose not to include the VSAT and C-Band services within the purview of Section 207. This section was part of the most sweeping telecommunications legislation to be passed in a half century. The Commission should adhere to Congressional direction and limit its rulemaking to those services clearly covered in Section 207.

- In the Report, Congress specifically noted that it was not its intention to reach C-band services.[35] With this in mind, the Local Communities submit that the adopted rule not include C-band antennas.

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[35] House Committee Report, H.Rep. 104-204 at 124. "The Committee notes that "Direct Broadcast Satellite Services" is a specific service that is limited to higher power DBS satellites. This service does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals. Thus, this section does not prevent the enforcement of State or local requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes."

- Section 207 is directed at reception not transmission. The Commission should revise its adopted rule in accordance with Congressional intention. Again, showing deference to local government regulation, Congress limited its rulemaking direction. The Report makes no mention of any intention on the part of Congress to reach antenna transmissions. This comment would apply not only to the smaller dishes but also larger dishes.

How Should We Implement Congress's Intent To Prevent Enforcement Of Private Restrictions Such As Deed Covenants And Homeowners' Associations?

The comments of the Local Communities are principally directed at the requests for comments on governmental regulations. We would, however, be remiss in failing to make certain comments on the proposed rule on nongovernmental restrictions. The proposed rule targeting such restrictions certainly will affect the citizens of the Local Communities.

The Commission is taking dangerous Constitutional steps in usurping individual choices expressed through contractual property rights in homeowner associations or covenants. For the most part, an aggrieved property owner knows of such restrictions at the time of property purchase. He or she may purchase the property because of the restrictions. Even if a restriction is imposed after the property purchase, presumably the allegedly aggrieved property owner had the opportunity to express his or her opposition to the restriction. The Commission, though, intends to step in

and overturn what in essence are private contractual agreements and property rights established by and among a community of property owners.

CONCLUSION

Local governments, through their zoning and other codes have been characterized as barriers and hurdles in the distribution of satellite services and the development of competition.[36] In reality, it would be foolish for the Local Communities to intentionally hinder or obstruct the development of such services. Citizens and businesses desire new state-of-the-art services. Communities, in competition with each other, must be an attractive place for new business. To the extent that any community purposefully and with concerted intention hinders development of satellite services that community is at a competitive disadvantage with respect to other communities which welcome the new services. County official, mayors, councilmembers and city staff will be held accountable by their citizens and businesses for services which are desired but not delivered and for the unrealized promise of development and jobs. Local governments are not waging war against federal purposes of encouraging technological development and competition. They seek such goals, but desire that their obligation to serve the public trust and to provide for public health, safety and welfare be recognized and accommodated.

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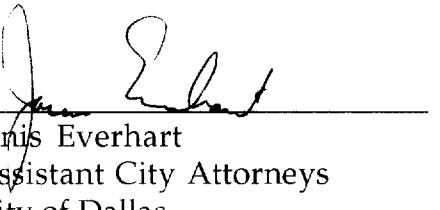
[36] See generally the Notice and e.g. NPRM ¶ 19,21 and 22. See also comments and reply comments of SBCA and HSN in connection with the comments requested with the Notice.

The Local Communities urge the Commission to revise its rule in accordance with expressed Congressional intentions and established federal principle of deference toward state and local health and safety regulations. The adopted rule includes more services that indicated by Congress and greater preemption than expressed by Congress. The rule is more sweeping than necessary in light of the statements of industry and the data presented to the Commission. The rule takes an approach of per se presumption of invalidity which turns on its head the deference usually given to the safety and health related regulations by federal courts. Contrary to the sweeping approach the Commission has adopted, alternatives, which are faithful to the Congressional mandate, which honor the place of local governments and the functions which they legitimately exercise and which do not reduce or minimize the development of satellite technologies, exist.

Respectfully submitted,

Scott Carlson



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